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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 180

RALPH WAGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

Ralph Wagner, the above named petitioner, prays that a writ of certiorari be issued by this court to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, entered on April 8, 1941 [R. 146], affirming a judgment of the United States District Court for the Southern District of California, Central Division, which said judgment by the said Circuit Court of Appeals was amended by order filed May 19, 1941 [R. 151], and in this behalf petitioner respectfully shows:

Opinion of the Court Below.

The opinion of the Court of Appeals was rendered and filed April 8, 1941, and is reported in the record at pages 146 to 150. That opinion was later and under date of May 19, 1941, amended by striking out one sentence in the original opinion and inserting in lieu thereof another sentence. This amendment is set out in the record at page 151. The opinion of the court below has not yet been published in any official report.

Statement of the Case.

1. The Circuit Court of Appeals affirmed the conviction of the petitioner under an indictment in one count charging the petitioner with income tax evasion for the year 1934, and affirmed the sentence imposed against the petitioner of two years' imprisonment and a fine of $2,500. The petitioner was tried before the court sitting without a jury.

The indictment charged that for the calendar year 1934:

> ". . . defendant had, derived and received a gross income of over $5,000, computed in accordance with the Revenue Act of 1934, c. 277, 48 Stat. 680 . . . to-wit: $100,050.83, derived as follows, that is to say:
>
> | | |
> |---|---|
> | Profits from sales of capital assets | $ 88,189.16 |
> | Income received from Mary McDermott | 11,044.29 |
> | Miscellaneous income | 679.88 |
> | Income from business as astrologer | 137.50 |
> | Gross Income | $100,050.83 |

Emphasis ours wherever used.

That for and during the said calendar year the said defendant was entitled to and allowed by the said Revenue Act deductions (other than those deductions taken in computing gross income as aforesaid) in the sum of, to-wit: $9,276.37, and no more, on account of the following:

Taxes paid	$ 126.97
Deductible losses	650.00
Bad debts	556.00
Contributions	235.00
Travel expenses	998.12
Attorney fees	35.00
Auto expenses	1,213.68
Depreciation on automobiles	447.93
Telephone and telegraph	866.28
Salary to E. Wagner	2,420.00
Office expense	49.71
Expense of managing fighter	1,495.46
Miscellaneous business expense	182.22
	$9,276.37"

* * * * * * * *

"That the said defendant, well knowing all of the foregoing facts, did on or about, to-wit: June 15, 1935, at Los Angeles, . . . wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat a large part of said tax, to-wit, $25,105.79, upon his said net income for the said calendar year 1934, and as means of so wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat said tax did . . . make under his oath to said Collector of Internal Revenue an income tax return for said calendar year, stating specifically therein the items of

his *gross income* for said calendar year, to have been the sum of $16,731.43, and no more, derived as follows:

"Promotional and ranching $16,731.43 and *stating specifically the items of deductions* (other than those taken in computing the amount of gross income aforesaid) allowed to him by said Revenue Act for said calendar year *to have been none* and stating therein *no other items of deductions*, and stating his *net income* for said calendar year to have been the sum of $16,731.43, and no more, and showing the total tax due and payable by him for said calendar year to have been the sum of $1,371.70 and no more; and he, the said defendant, did then and there pay to the said Collector the sum of $50.00 and no more, as and for his income tax for said calendar year 1934." [R. 2-5.]

This item of $16,731.43 reported as gross income (and the same amount was reported as net income), came from the partnership return of petitioner Ralph Wagner and his adopted son Ernest Wagner, as shown by the following, taken from the testimony of Internal Revenue Agent Irving Stacy, a prosecution witness. He testified that the

"partnership return (was) filed by Ralph Wagner and Ernest Wagner showing net income of $33,462.86. This was divided equally between Ralph Wagner and Ernest Wagner, and was transferred to their individual returns, Ralph Wagner reporting $16,731.43, and Ernest Wagner reporting a like amount. Of course the Bureau of Internal Revenue has denied partnership." [R. 70.]

2. The Circuit Court of Appeals held:

> "There is much in the record tending to prove deliberate fabrication of evidence in building up the taxpayer's indebtedness. [Op. Court of Appeals, R. 150.]

Petitioner was charged under an indictment that descended to particulars; he was put on trial under those particular averments in the indictment; the prosecution, in the midst of the trial, abandoned those particulars alleged and proceeded on an entirely different theory and convicted the petitioner of something different from that charged in the indictment.

The evidence produced by the prosecution disclosed that the indictment was returned, and the trial proceeded, upon the theory that the petitioner, for the purpose of evading the payment of income taxes, fabricated the idea of a partnership between the petitioner and his adopted son, Ernest Wagner; that such partnership had no basis in law or fact and the idea of a partnership was made up out of the whole cloth merely for the purpose of evading the tax.

During the progress of the trial, the court was examining a prosecution witness, Harlan Moore, who had prepared the return in question. The following occurred:

> "The Court: . . . the Government contends that there was no partnership, and that the idea of a partnership arose in the mind of the defendant with the idea of defrauding the Government." [R. 28.]

At the conclusion of the trial, and after discussing at length the elements of a partnership from the standpoint of civil liability, the trial court stated:

> " 'Now I am not going to analyze the facts other than to say that there are certain uncontradicted facts here which, to my mind, lead me to the conclusion that the relationship between the parties here, . . . while not establishing a partnership in law, are sufficient to raise doubt as to whether there was a fraudulent intent on the part of the defendant here in conveying to the accountant that a partnership existed.' " [Rep. Tr. 497.]

The gross income and the allowable deductions set out in the indictment and last referred to came from the "reconstructed return" prepared by the prosecution witness, Irving Stacy. [See abstract of his testimony, R. 70.] This witness testified:

> " 'I am an internal revenue agent. I have reconstructed what the Bureau of Internal Revenue considers to be a proper tax return of Ralph Wagner for the calendar year 1934. There are three returns involved in this action. One is a partnership return filed by Ralph Wagner and Ernest Wagner showing net income of $33,462.86. This was divided equally between Ralph Wagner and Ernest Wagner, and was transferred to their individual returns, Ralph Wagner reporting $16,731.43, and Ernest Wagner reporting a like amount. Of course the Bureau of Internal Revenue has denied partnership. . . ."

As heretofore stated, the $16,731.43 set up in the indictment [R. 70] as being the returned gross income—and also the returned net income, because no items of deductions were taken from that item by the petitioner—was reached by dividing between Ralph Wagner and Ernest Wagner the "net income of $33,462.86" shown on the partnership return.

3. The Circuit Court of Appeals denied petitioner's "Motion for a New Trial or to Remand," made in the Circuit Court and which motion was based on the ground of newly-discovered evidence and was submitted to the Court of Appeals coincident with the submission of the appeal. [Op. Court of Appeals, R. 146.]

This motion was supported by affidavits of Ralph Wagner, Kimo E. Ward, Leo Ellis Wagner, Thomas Hunter, Edith Hull, Frank E. Wellens, Theresa Pettinger and Luis A. Trias [R. 118], and was made under Rule II (3) of Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases promulgated by this court and which rule provides:

> "A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment."

The Circuit Court stated that it had reviewed the affidavits and found "them to consist largely of hearsay statements and of impeachment of testimony received in the trial," and that the Circuit Court did not "regard them as meeting the requirements, and particularly requirement (e) of Johnson v. United States, 32 Fed. (2d) 127" [Op. Court of Appeals, R. 146], wherein, according to the opinion of the Ninth Circuit Court of Appeals, it is held that the newly discovered evidence disclosed by the affidavits must be shown in the affidavits themselves to be

> ". . . of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."

4. The Circuit Court of Appeals denied the motion of petitioner to remand the cause to the trial court to the end that the motion for a new trial might be ruled, stating in its opinion in the first instance:

> "We have no power to entertain a motion for a new trial, hence we consider only whether or not we should use our discretion to remand." [R. 147.]

It later modified that sentence by stating:

> "We have no power to entertain a motion for a new trial, hence we consider only whether, in the exercise of our discretion, we should remand the case." [R. 152.]

The Questions Presented.

I.

The Circuit Court of Appeals held:

a. That the petitioner did have the benefit of a fair trial; that petitioner's contention to the effect that the failure of the prosecution to establish its major premise, viz., that the idea of a partnership was created in the mind of the then defendant as a vehicle for the fraud, and for that reason petitioner was convicted on a charge different from that set up in the indictment, is "without merit and . . . too flimsy to justify further comment." [Op. Court of Appeals, R. 150.]

1. The question thus arises whether or not a defendant is justly convicted where the charge (a) is not set out in the words of the statute with only such recital of details as is sufficient to put the defendant on notice of the charge against him, and so as to enable him to prepare his defense and to plead his acquittal or conviction as a bar to another prosecution for the same offense, but (b) descends to particulars, charging details of the fraud, which details are not proven beyond reasonable doubt, or are abandoned by the prosecution in the midst of the trial.

The question is new and is not covered by any of the decisions of this court, but should be settled by this court, particularly inasmuch as it involves a question of general law as to the rights of an accused who is charged with income tax evasion by the use of specific means and in specific amounts to be tried on *those* charges and not upon *other* charges of fraud arising during the trial through the abandonment by the prosecution of its major premise; in this instance, the "false partnership" theory.

II.

The Circuit Court of Appeals held:

a. That it had no power to entertain a motion for a new trial; that the motion to remand the case to the trial court, to the end that the motion for a new trial may there be ruled, ought not to be granted unless in the opinion of the Circuit Court the affidavits submitted in support of such motion for a new trial be of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

b. In effect, that, under the Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases, promulgated by this court on May 7, 1934, pursuant to the Act of Congress approved March 8, 1934, the Circuit Court has the discretionary right to remand, or to refuse to remand, the cause to the trial court to the end that the motion for a new trial may be ruled.

c. In effect, that, under the said Rules of Practice and Procedure, etc., a defendant who appeals from the judgment of a trial court, "within five (5) days after the entry of judgment of conviction," as prescribed in said Rules (Rule III), loses the right which, had he not appealed, he would have had to move the trial court "for a new trial solely upon the ground of newly discovered evidence . . . made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered," as prescribed by said Rules. [Rule II (3).]

1. The question thus arises whether the Circuit Court of Appeals which, according to the opinion of that court, has "no power to entertain a motion for a new trial" [R. 147], can properly consider and determine the probable effect, before the trial court, of the newly discovered evidence, as that evidence is set out in the affidavits filed in support of the motion for a new trial or to remand, if such new trial is granted.

2. The question also arises as to whether or not, under the Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases, promulgated by this court on May 7, 1934, pursuant to the Act of Congress approved March 8, 1934, the Circuit Court has any discretionary right to refuse to an appealing defendant the right to have the trial court rule on his motion for a new trial based solely upon newly-discovered evidence, when such right to have such trial court rule upon a motion for a new trial based "solely upon the ground of newly-discovered evidence" is clearly available to a defendant who does *not* appeal.

Both of these questions are new and are not covered by any decisions of this court; both of them ought to be decided by this court because they are important questions of Federal Law and Rules of Practice and Procedure, particularly as those Rules of Practice and Procedure have lately been promulgated by this court and affect the substantive rights of persons accused of crime.

REASONS FOR GRANTING THE WRIT.

I.

The Circuit Court of Appeals Has Decided a Question of Substance Not Heretofore Determined by This Court, and Decided It in a Way Probably Not in Accord With Applicable Decisions of This Court; Such Circuit Court of Appeals Has Decided an Important Question of General Law in a Way Probably Untenable and Has so Far Sanctioned a Departure by the Lower Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The holdings of the Circuit Court of Appeals set forth above under the caption "The Questions Presented," subdivision I-a (which in the interest of brevity are not repeated here), present questions which this court has never yet passed upon and which, obviously, should be passed upon by this court. The questions thus presented have directly to do with the rights as secured to a defendant in a criminal case under the Fifth Amendment to the Constitution of the United States, providing that:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

and also under the Sixth Amendment to the Constitution, providing that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

Even where the offense is purely statutory, as in this instance, and has no relation to the common law, and that definition of the offense includes generic terms, it is not sufficient for the indictment to charge the offense in the same generic terms as in the definition; the indictment must descend to particulars so as to inform the accused of the nature of the charge against him to the end that he may properly prepare his defense. Those particulars are matters of substance and not merely of form. See:

United States v. Cruikshank, 92 U. S. 542;

United States v. Hess, 124 U. S. 483;

Stokes v. United States, 157 U. S. 187.

II.

The Circuit Court of Appeals Has Decided an Important Question of General Law in a Way Probably Untenable, and Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court; and Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings, as to Call for an Exercise of This Court's Power of Supervision.

1. The holdings of the Circuit Court of Appeals set forth above under the caption "The Questions Presented," subdivisions II-a and II-b (which in the interest of brevity are not repeated here), are apparently in conflict with the weight of authority and the applicable decisions of other Circuit Courts of Appeals and of this court in holding that the Circuit Court of Appeals and not the trial court should decide on the sufficiency of the affidavits and the probable effect on a new trial of the evidence set out in the affidavits appended to the motion for a new trial.

The refusal of the Circuit Court to remand the case to the trial court for a ruling on the motion for a new trial, in effect, substitutes the discretion of the Circuit Court for the discretion that should repose in the trial court.

2. The holding of the Circuit Court of Appeals set out above under the caption, "The Questions Presented," subdivision II-c (which in the interest of brevity is not repeated here), is probably untenable and such holding involves an important question of federal law which has not been, but should be, settled by this court, and such holdings have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Petitioner respectfully represents that accompanying this petition, and as an exhibit thereto, is a certified copy of the transcript of the entire record in the case, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

Wherefore, it is respectfully submitted that this petition be granted.

DAVID H. CANNON,
Attorney for Petitioner.

Certificate of Verification.

State of California, County of Los Angeles—ss.

David H. Cannon, being first duly sworn, deposes and says: That he is counsel for Ralph Wagner, petitioner in the within and foregoing action; that he prepared the within petition and that the matters therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

DAVID H. CANNON,
Counsel.

Subscribed and sworn to before me this 12th day of June, 1941.

(Seal) THERESA FITZGIBBON,
Notary Public in and for Said County and State.